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No. 178

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

STATE TAX COMMISSION OF UTAH, *Petitioner*,

v.

PACIFIC STATES CAST IRON PIPE COMPANY, a corporation, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR PETITIONER

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OPINION BELOW

The opinion of the Utah Supreme Court (R. 88-97) is reported at 13 Utah 2d 113, 369 P.2d 123.

JURISDICTION

The judgment of the Utah Supreme Court was entered on February 20, 1962 (R. 97). A timely petition for rehearing was filed March 12, 1962 (R. 98). That petition was

denied on March 26, 1962 (R. 98). The petition for writ of certiorari was filed June 13, 1962, and was granted October 8, 1962, (U. S. ....., 9 L.Ed.2d 53. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

I. Whether a tax required by state law to be imposed on every consummated transaction of sale constitutes a burden on interstate commerce when imposed upon goods sold and delivered in Utah to a purchaser, and thereafter transported by said purchaser, pursuant to contractual agreement with the seller, to an out-of-state destination for use and consumption.

CONSTITUTION AND STATUTES INVOLVED

The case directly involves the following:

Article I, Section 8, of the Constitution of the United States, which reads in part:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."

Utah Code Annotated, 1953, pertinent sections of which provide:

> 59-15-4. Excise Tax—Rate. "From and after the effective date of this Act, there is levied and there shall be collected and paid:
>
> (a) A tax upon every retail sale of tangible personal property made within the state of Utah equivalent to two per cent of the purchase price paid or charged . . ."
>
> 59-15-2(b). "The term 'sale' or 'sales' includes installment and credit sales, and the exchange of pro-

perties as well as the sale thereof for money, every closed transaction constituting a sale . . ."

STATEMENT

This case is an original proceeding in the Supreme Court of the State of Utah to review an order and decision of the State Tax Commission of Utah (referred to herein as the "Tax Commission"). The Tax Commission imposed sales tax liability upon the respondent, Pacific States Cast Iron Pipe Company (referred to herein as the "Pipe Company"), for sales made by it of cast iron pipe and related commodities to contractors within the State of Utah, which materials were subsequently transported outside the state for use and consumption.

The essential facts are not in dispute. They are set forth in substance by the Utah Supreme Court in its opinion below (R. 88-97). They show that respondent is a Nevada corporation, duly qualified to do business in the State of Utah, and is engaged in the manufacture and sale of cast iron pipe and related items (R. 1). This pipe is manufactured in Provo, Utah, and is sold throughout the Western States (R. 1).

The Tax Commission proposed a sales tax deficiency against the Pipe Company on sales of cast iron pipe by it to various contractors wherein the contractor, as purchaser, took delivery of materials from the Pipe Company in the contractor's own trucks at respondent's plant near Provo, Utah (R. 7-8).

All of the sales which were subjected to this deficiency assessment were solicited by means of quotations given by the Pipe Company to contractors bidding on various out-

of Utah jobs; and the materials purchased as a result of these quotations were purchased for use on specific out-of-state jobs and were of specified sizes and lengths to conform to the specifications covering the particular project involved (R. 73-74).

The original quotations contemplated delivery of goods sold to the purchaser at the worksite outside the State of Utah (Ex. 4(b); R. 42, 147-159) (Ex. 5(b); R. 43, 169-170) (Ex. 6(b); R. 43, 195-197) (Ex. 7(b); R. 43, 243-249). However, the parties by subsequent correspondence or dealings modified this requirement, and agreed that delivery should be made to the buyer at the Pipe Company's foundry, f.o.b. Provo, Utah (Ex. 4(c); R. 42, 153) (Ex. 4(e); R. 42, 157) (Ex. 5(c); R. 43, 171) (Ex. 5(d); R. 43, 174) (Ex. 6(b); R. 43, 197) (Ex. 6(e); R. 43, 204) (Ex. 7(d); R. 43, 259, 261) (Ex. 7(e); R. 43, 262). The invoices and bills of lading which represent the transactions further show that title to the pipe passed within the State of Utah when it was delivered to the buyer at the place agreed upon and that the buyer was thereafter responsible for the payment of freight and other charges accruing against the property (Ex. 4(d); R. 42, 155) (Ex. 4(e); R. 42, 158) (Exhibits 5, 6 and 7 contain information of a similar import and are typical of transaction herein. R. 72).

Hereafter, both vendor and vendee considered the pipe to be the exclusive property of the vendee. The record shows that the buyers thought they were carrying their own goods, and as a result did not obtain the permit required by Section 59-6-9, Utah Code Annotated, 1953, of all interstate contract motor carriers transporting property for hire (R. 50, 71).

Based upon the stated facts, the Tax Commission concluded that the respondent Pipe Company was responsible, under Utah law, for the collection and payment of sales tax on those items only which it sold f.o.b. Provo, Utah, to contractors coming within the State of Utah to accept delivery. It further concluded that title to all materials so purchased and delivered passed in the State of Utah and that, therefore, the more than four million dollars worth of transactions were not sales in interstate commerce (R. 77).

The respondent Pipe Company objected to these conclusions, contending that it was legally obligated to effectuate delivery outside the State of Utah; and, as the quoted prices called for a sale f.o.b. foundry plus freight to the job site, and, as the materials were concededly purchased for out-of-state use, that there was sufficient certainty of out-of-state destination to require a finding that the sales were, indeed, in interstate commerce (R. 9-22). Respondent further contended that the risk of multiple taxation herein constituted a test for invalidity of the tax under the Commerce Clause (R. 23-24).

The Tax Commission, in its decision of May 23, 1961, upheld the proposed tax deficiency against the respondent (R. 73-78). Respondent thereupon filed a petition for writ of certiorari with the Supreme Court of Utah (R. 78-86). It therein raised the federal question here sought to be reviewed by asserting that the imposition of the tax was a burden on interstate commerce, prohibited by the Commerce Clause of the United States Constitution (R. 78, 80).

The Supreme Court of Utah, after hearing arguments

thereon, reversed the decision of the Tax Commission and stated in its opinion the constitutional grounds which the Pipe Company had asserted, namely, that the state statute as applied under the facts of this case reflected "a situation offensive to the Commerce Clause" (R. 88, 91).

The Tax Commission filed a timely petition for writ of certiorari which was granted by this Court on October 8, 1962.

SUMMARY OF ARGUMENT

Utah law requires that a sales tax be imposed upon every closed transaction of sale. Where both vendor and purchaser are present, and where passage of title and delivery of possession to the vendee occur in Utah, the sales transaction becomes closed and results in a local event taxable by the state. *International Harvester Co.* v. *Treasury*, 322 U.S. 340. Such transactions must be distinguished from interstate sales, which require, as an essential part of the sale, and necessary to its consummation, the movement of materials purchased across state boundary lines.

A contractual agreement between seller and buyer to the effect that the buyer will thereafter transport the materials so purchased to an out-of-state site for use and consumption does not convert the sale into one in interstate commerce. *Dept. of Treasury of Indiana* v. *Wood Preserving Corp.*, 313 U.S. 62. Such an agreement, if valid, is merely incidental to the sale and not a necessary part thereof in view of the fact that purchaser has received title and possession before entering into the agreement. Similarly, an agreement by the seller to pay freight to an

out-of-state destination does not transmute an intrastate sale into an interstate sale free from local tax burden.

The Utah Supreme Court mistakenly applied the rule of *Richfield Oil Co. v. State Board*, 329 U.S. 69, to the facts of this case. For purposes of state taxation of sales, manifest certainty of out-of-state destination of materials purchased should not be controlling. That which is important is that the tax be one which in form or substance cannot be repeated by another state in such a manner as to lay an added burden on interstate distribution (*Western Livestock v. Bureau*, 303 U.S. 250).

The further fact that the state of use may have imposed a use tax on the materials in question after their transportation from Utah does not bar the latter state from subsequently imposing a sales tax upon the fully consummated sale within its borders.

ARGUMENT

A NON-DISCRIMINATORY SALES TAX IMPOSED UPON GOODS SOLD AND DELIVERED TO A PURCHASER WITHIN THE BOUNDARIES OF A SELLER'S STATE DOES NOT CONSTITUTE A BURDEN ON INTERSTATE COMMERCE UNDER ARTICLE I, SECTION 8, OF THE UNITED STATES CONSTITUTION.

A. THE SALES HEREIN BECOME CLOSED AND CONSTITUTE LOCAL TRANSACTIONS UPON PASSAGE OF TITLE AND DELIVERY OF POSSESSION WITHIN THE STATE.

The tax involved herein is a "tax upon every retail sale of tangible personal property made within the State of Utah equivalent to 2 per cent [now 2½ per cent] of the purchase price paid or charged . . ." Utah Code Annotated 59-15-4(a).

A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price. Utah Code Annotated 60-1-4(2).

For purposes of the Sales Tax Act every closed transaction constitutes a sale. Utah Code Annotated 59-15-2(b).

A sale which requires transportation of goods across a state boundary *as an essential element of the contract of sale* is said to be a sale in interstate commerce; and the courts have construed Article I, Section 8, of the Federal Constitution to prohibit the states from laying a tax upon such a sale. See *Wiloil Corporation* v. *Pennsylvania*, 294 U.S. 169.

Petitioner contends that the sales transactions herein are fully consummated in Utah and become closed and taxable local events within that state. Any transportation incurred in connection with such a sale is merely incidental and subsequent thereto.

The petitioner submits that the vendor is not obliged to make a physical delivery across the state boundary line when the purchaser has already accepted title and delivery in Utah. Nor is the movement of goods an essential part of the sale thereof when title and possession are previously in a purchaser within the seller's state.

It is true that the quotations originally issued by respondent to contractors herein contemplated out-of-state delivery. However, the parties by subsequent correspondence and dealing modified this requirement and agreed that delivery should be made to the buyer at respondent's foundry, f.o.b., Provo, Utah. (For example see Ex. 7(d); R. 43, 261.)

The Tax Commission found that title passed within the State of Utah when the goods were so delivered to buyers at the place agreed upon (R. 77). This finding has not been challenged. At the time of delivery both vendor and vendee considered the cast iron pipe sold to be the exclusive property of the vendee. In fact, one of the major contractors stated, at the hearing before the Tax Commission, "You don't need a license to carry your own products." (R. 71)

Section 54-6-1, Utah Code Annotated, 1953, defines a contract motor carrier of property to mean any person engaged in the transportation of property for hire not included in the definition of common motor carrier of property. Section 54-6-9, Utah Code Annotated, 1953, provides:

> "It shall be unlawful for any contract motor carrier to operate as a carrier in interstate commerce within this state without first having obtained from the commission a permit therefor . . ."

The purchasers herein did not have a permit or certificate issued by the Utah Public Service Commission, and none was required by the Pipe Company of its vendees (R. 50, 57, 71). The Tax Commission concluded, therefore, that the purchasers were not shipping for hire, were not contract carriers, indeed could not be, and were under no obligation to the vendor to deliver the material so purchased outside the State of Utah (R. 76).

This conclusion is fully supported by the various provisions of the bill of lading signed by the purchaser upon receipt of the pipe at respondent's foundry. Section 1(a) on the reverse side of the bill of lading, under a heading

"Contract Terms and Conditions" provides:

> "The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto . . ." (Ex. 4(d); R. 42, 155) (Ex. 5(d); R. 43, 175) (Ex. 6(d); R. 43, 202) (Ex. 7(d); R. 43, 260).

Section 7 of the same bill of lading provides:

> "The owner or consignee shall pay the freight and overage, if any, and all other lawful charges accruing on said property . . ." Id.

The invoices under which the goods are shipped provide, as part of their terms and conditions:

> "4. Delivery is to be made F.O.B. seller's foundry, upon which sellers' responsibility ceases.
>
> 5. Freight charges when included in the selling price, are to be paid by the buyer. Freight allowance is based on a specific rate to agreed destination and when shipments are forwarded freight collect the amount of freight is to be deducted by us on the face of the invoice. Consignee assumes the risk in paying any additional charges without our consent." (Ex. 4(e); R. 42, 158), (Ex. 5(e); R. 43, 178) (Ex. 6(e); R. 43, 205) (Ex. 7(e); R. 43, 263).

These provisions negative any claim that the sale was not complete upon delivery to the purchaser in Utah. Delivery across a state line is not necessary or required to effectuate the passage of title or the completion of the sale. The purchaser has complete and full title to the pipe at the time it is taken into its vehicles for transportation out of Utah. *Whitmore Oxygen Co.* v. *State Tax Commission*, 114 Utah 1, 196 P.2d 976. Transportation thereafter is only incidental to the contract of sale, passage of title and de-

livery of possession having preceded such transportation.

A closely parallel fact situation was presented to this Court by *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390. In that case Superior Oil Co., a corporation created and doing business in Mississippi, sold gasoline in Mississippi to packers and delivered it at the packers' wharves. The packers loaded the oil upon their own fishing boats and delivered it downstream to fishermen in Louisiana. Superior Oil Co. received, in each case, from the purchaser a bill of lading signed by the master of the boat on which the oil was loaded and reading in part:

> "Consigned to [purchaser]. Destination: Grants Pass, La. By boat Frank Louis, owned or operated by Gussie Fontaine Pkg. Co." Id. p. 394

The instrument then provided that:

> "The property consigned herein remains the property of said Superior Oil Company until it shall be delivered to consignee or consignee's agent at point of destination." Id. p. 394

with other provisions throwing all risks upon the purchaser.

This Court said:

> "The document seems to have had no other use than, as the Supreme Court of Mississippi said, to try to convert a domestic transaction into one in interstate commerce. There was no consignee at the point of destination. The goods were delivered to the so-called consignee before they started, and were in its hands throughout." Id. p. 394

So, here, the bill of lading, under which respondent claims to be obliged to make out-of-state delivery, only serves to try to convert a domestic transaction into one in interstate commerce.

The respondent contends that the imposition of the sales tax as proposed by the Tax Commission is a burden on interstate commerce prohibited by the Commerce Clause of the Federal Constitution, and cites as principal authority for this proposition: *Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434, and *Freeman* v. *Hewit*, 329 U.S. 249. All of these cases involved the application of an Indiana gross receipts tax to the gross proceeds of an interstate sale. These leading cases reflect situations in which the state of the seller imposed a gross receipts tax on a sales transaction consummated within its boundaries, the title passing within the state but delivery and possession being taken in a foreign state.

The case of *Freeman* v. *Hewit*, 329 U.S. 249, was further distinguished by this Court, when it said:

> "... the tax now here is not a 'tax on the transfer of property' within the State, which was the basis for sustaining this tax in *Harvester Co.* v. *Dept. of Treasury*...." 329 U.S. 249, 258.

The *Freeman* v. *Hewit* case dealt with an Indiana resident who ordered his broker to sell certain securities for him. The sale was arranged and took place on the New York Stock Exchange through a New York broker. The receipts were remitted to the seller, who was subjected to an Indiana tax upon the entire gross income of residents. Such a case is certainly not precedent in the instant matter.

Respondent contends it is obliged to make deliveries out of Utah by virtue of the bills of lading referred to above. In this regard the case of *Department of Treasury*

of Indiana v. *Wood Preserving Corp.*, 313 U.S. 62, is significant. There the validity of the Indiana gross income tax was challenged. The Wood Preserving Corporation brought suit to recover taxes collected from it by the State of Indiana, on the ground that such taxes were invalid under the Federal Constitution, as laid upon income received outside the state, thus constituting an unlawful burden upon interstate commerce.

The corporation, having its principal place of business at Pittsburgh, Pennsylvania, but with an office at Marietta, Ohio, was engaged in the business of treating railroad ties by creosoting them, and also in the business of purchasing ties and selling them to railroads with whom it had contracts for tie treatment.

The taxes in question were laid upon the corporation's gross receipts from the sale of ties to the Baltimore & Ohio Railroad Company in the State of Indiana in accordance with certain contracts. One contract provided for the sale of raw ties by the corporation to the Baltimore & Ohio Railroad Company, delivered f.o.b. cars on the railroad tracks, while the supplemental contract required that all such ties delivered to the railroad in Indiana should be shipped to the corporations' plant at Finney, Ohio, for treatment.

The taxes in question were levied by the Indiana taxing authorities on the gross receipts which the corporation derived from the sale of the untreated ties, pursuant to an Indiana statute providing for a tax upon gross income derived from sources within the State of Indiana of all nonresident persons and corporations. The sales receipts did

not include charges for the creosoting treatment; these being separately billed to the railroad company when the treatment was completed. This court, speaking through Mr. Chief Justice Hughes, in an unanimous opinion, said at 313 U.S. 67:

> "Further, as the sole object of the challenged tax is the income derived from respondent's sales to the Railroad Company, there is no occasion for apportionment. The creosoting operations in Ohio, and the income derived from them, were not involved. And the fact that the ties which were sold to the Railroad Company were purchased by respondent through orders given to the Indiana producers from respondent's Marietta office cannot affect the authority of Indiana to tax the receipts from intrastate activities of respondent in its dealings with the Railroad Company." (Citing cases)

And continued at p. 68:

> "These were local transactions—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were nonetheless intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad Company in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. *Respondent did not pay the freight for that transportation, and the circumstance that the billing was in its name as consignor is not of consequence in the light of the fact showing the completed delivery to the Railroad Company in Indiana.*" (Emphasis supplied.)

The case of *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340, is also relied upon by this petitioner. There, the State of Indiana assessed a gross receipts tax on certain classes of sales by the plaintiff, International Harvester Company. The plaintiff was authorized to do business in Indiana but incorporated under the laws of another state. Among the items said to be taxable by the state were certain sales described by the Indiana Supreme Court as:

> "Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this State."

This Court said:

> "The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to Indiana, takes delivery there and transports the goods to another State. . . . Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana. In *McGoldrick v. Berwind-White Co.*, 309 U.S. 33, we had before us a question of the constitutionality of a New York City sales tax as applied to purchases from out-of-state sellers. The tax was 'laid upon the buyer, for consumption, of tangible personal property, and measured by the sales price.' Id., p. 43. And it was 'conditioned upon events occurring' within New York, i.e., the transfer of title or possession of the purchased property. Id., pp. 43-44. Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. *But in each a local transaction*

is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce." 322 U.S. 345, 346. (Emphasis supplied.).

And concluded:

"We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. *Such 'local activities or privileges' . . . are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage.*" 322 U.S. 349.

Petitioner submits that the activity taxed in the present case is wholly intrastate. The tax herein is conditioned upon local activity; that is, the delivery of goods sold to a purchaser within the State of Utah. Such a sale is distinct, for purposes of interstate commerce, from a sale either f.o.b. point of origin or point of destination, delivered to a common carrier and received by the purchaser outside the taxing state. This is because in the first instance all of the legal requisites of a sale are completed within the borders of the taxing state. In the latter, an interstate common carrier is necessary to effectuate delivery to the ultimate purchaser and its is questionable whether or not the essential element of delivery occurs within the state. The first is a taxable local event; the second may or may not be subject to a sales tax by the state of the seller, but this fact situation is not before the Court.

The activity taxed herein is one which, apart from its relationship to interstate commerce because of the very

nature of the purchaser, is subject to the state taxing power. The effect of the tax, even though upon a sale of goods intended to be transported from the state, is neither to discriminate against nor obstruct interstate commerce more than other state taxes which have repeatedly been sustained as involving no forbidden interference with interstate commerce. See *Aero-Mayflower Transit Co.* v. *Board of Railroad Commissioners*, 332 U.S. 495; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33; *Alaska* v. *Arctic Maid*, 366 U.S. 199.

B. MANIFEST CERTAINTY OF OUT-OF-STATE DESTINATION AND USE OF MATERIALS DOES NOT TRANSMUTE AN OTHERWISE INTRASTATE SALE INTO ONE IN INTERSTATE COMMERCE.

Petitioner submits the Court below erred in holding that the rationale of the *Richfield Oil* case, 329 U.S. 69, involving a tax of exports in foreign commerce, could be applied to a non-discriminatory sales tax upon a local activity incident to interstate commerce. This proposition can be clearly demonstrated by three cases arising under the New York City Municipal Sales Tax Law. The three cases, all decided in the year 1940 by this Court, are *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33; *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414, and *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430.

The *Berwind-White* case involved sales of coal under contracts entered into with a municipality calling for delivery therein. The contracts contemplated that the coal was to be mined in another state and was to be transported from such state to a terminal in a third state, from which

it was to be delivered to purchasers at points within the municipality of New York City. This Court, in upholding the imposition of the New York City sales tax upon such local deliveries, stated:

> "But is was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business, *Western Livestock* v. *Bureau*, 303 U.S. 250, 254. Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress .... Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited. The like taxation of property shipped interstate, before its movement begins, or after it ends, is not a forbidden regulation ... Nor is taxation of a local business or occupation which is separate and distinct from the transportation or intercourse which is interstate commerce, forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by such business, or is a prerquisite to it." 309 U.S. 33, 46-47.

Then ruled:

> "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption. It is an activity which, apart from its effect on the commerce, is subject to the state taxing power. The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which

have been repeatedly sustained as involving no prohibitive regulation of interstate commerce." Id. p. 58.

With the *McGoldrick* v. *Berwind-White* case as a background, this Court later in the same year was called upon to decide two cases wherein the New York City sales tax had been applied to sales in foreign commerce. The first of these cases was *McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414. In that case crude oil was imported from a foreign country and held in the manufacturers' warehouse pursuant to a bond given for the purpose of enabling the importer to bring such petroleum into the United States, to manufacture it while in bond as a fuel oil and then withdraw it for export or other lawful purpose free from the import duty which would otherwise be payable. The Comptroller of the City of New York determined that the respondent was subject to the City tax laid upon sales of fuel oil manufactured in New York City from crude petroleum which had been imported from a foreign country and sold and delivered as ship's stores to vessels engaged in foreign commerce. Foreshadowing the *Richfield Oil* case, it was held:

> "From the time of importation until the moment when the . . . oil is ladened upon vessels engaged in foreign trade, the imported petroleum and its product, the fuel oil, is segregated from the common mass of goods and property within the state, and is subject to the supervision and control of federal customs officers. It cannot lawfully be removed from the manufacturing warehouse except for delivery for use as fuel to a vessel engaged in foreign commerce and it cannot lawfully be diverted from such destination and cannot after delivery to the vessel, be landed in the United States . . ." 309 U.S. 414, 425-426.

And concluded:

> "The state tax in the circumstances must fail as an infringement of the Congressional regulation of the commerce." (Citing cases.) Id. p. 429.

On the same day, this Court decided *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, wherein the Comptroller of the City of New York had imposed the New York City sales tax upon sales of foreign oil manufactured from petroleum imported from a foreign country, sold and delivered as ship's stores to vessels engaged in foreign commerce under an almost identical fact situation. The Appellate Division of the New York Supreme Court held that the taxing statutes constituted an unconstitutional burden on interstate commerce. 254 App. Div. 237, 4 N.Y.S. 2d 661. The Court of Appeals of New York affirmed, 279 N.Y. 192, 18 N.E.2d 828, on the single ground that the tax was unconstitutional by reason of its effect on interstate commerce, and by an amended remittitur, that Court stated that the affirmance was on the sole ground that the tax violated the Commerce Clause, 280 N.Y. 691, 21 N.E.2d 199. Counsel for the taxpayer urged this Court to consider the question of foreign commerce which had not been considered or passed upon by the lower Courts. The Court refused to consider any grounds of attack upon the statute not raised or decided in the State Court. Upon the express point submitted, that of the unconstitutionality of the New York City sales tax on the ground that it constituted a burden on interstate commerce, this Court held:

> *"So far as the validity of the tax with respect to the interstate commerce is concerned, our decision sustaining it in the Berwind-White Coal Mining Co.*

case is controlling and the judgment must be reversed . . . ." 309 U.S., at 432. (Emphasis supplied.)

Thus, a sales tax was *not* an unconstitutional burden on interstate commerce when imposed on a sale of bunker fuel and diesel engine oil from tanks in New Jersey to ships engaged in foreign commerce docked in the port of New York, but under an almost identical state of facts where the foreign commerce question was pleaded, it was held that fuel oil from bonded warehouses sold in foreign commerce was not subject to the same City sales tax.

The Tax Commission respectfully suggests that the same analysis is applicable regarding the holding in the *Richfield Oil* case, 329 U.S. 69; that is, that what is prohibited in regards to foreign commerce is not necessarily an unconstitutional burden on interstate commerce. In the case of foreign commerce property is subject to the state taxing power only as long as the movement to foreign shores has neither started nor been committed. *Empresa Siderurgica, S. A. v. Merced*, 337 U.S. 154. Manifest certainty of foreign destination is sufficient to prohibit the tax under the Foreign Commerce Clause of the Constitution but is not controlling under an almost identical set of facts where the only question before the Court is interstate commerce.

A sales tax, non-discriminatory in nature, applied to the transfer of property immediately before its entrance into interstate commerce, is not an unconstitutional burden upon that commerce so as to be prohibited by the United States Constitution. See *Eastern Air Transport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147; *Interna-*

tional Harvester Co. v. Dept. of Treasury, 332 U.S. 340.

The case of *Empresa Siderurgica, S.A. v. Merrell*, 337 U.S. 154, authored by Mr. Justice Douglas, is illustrative of this point and contains other language bearing upon the holding of the Court below. That case involved the sale of a cement plant to a South American corporation for export. An export license was obtained, title passed and possession was taken on behalf of the purchaser. A common carrier was employed to do the dismantling and packaging for shipment. As dismantling proceeded, shipments were labeled with the foreign company's name as consignee and delivered to a rail carrier. A personal property tax on the property was levied for the years 1945 and 1946; and the tax date was March 5, 1945. On that date 12 per cent of the plant had been shipped out of the country. That portion was relieved of the tax, and the balance was taxed. That included 10 per cent of the property which had been dismantled and crated or prepared for shipment, 34 per cent which had been dismantled and not crated or prepare for shipment, and 44 per cent which had not been dismantled at all. But before the end of January, 1946, all of the property had been shipped by rail to a port and was enroute to South America by ocean carrier. This Court was faced with the question whether or not the state tax laid upon this property was an unconstitutional tax on exports in violation of Article I, Section 10, Clause 2, of the United States Constitution. The company paid the tax under protest and brought suit to recover it. This Court said, at p. 156:

". . . goods do not cease to be part of the general mass of property in the State, subject, as such, to its

jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.' *Coe* v. *Errol*, 116 U.S. 517, 527. That test was fashioned to determine the validity under the Commerce Clause of a non-discriminatory state tax. But as we noted in *Richfield Oil Corp.* v. *State Board*, 329 U.S. 69, 79, it is equally applicable to cases arising either under Article I, § 10, Cl. 2 (the Import-Export Clause) or under Article I, § 9, Cl. 5, which prohibits Congress from laying any tax on 'Articles exported from any State.'

"Under that test it is not enough that there is an intent to export or a plan which contemplates exportation, or an integrated series of events which will end with it. . . . The tax immunity runs to the process of exportation and the transactions and documents embraced in it. . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice." Id., at 156-157.

"So in this case it is not enough that on the tax date there was a purpose and plan to export this property. *Nor is it sufficient that in due course that plan was fully executed.* Part of the plant that is taxed was dismantled, but it had not been delivered to any carrier for export or otherwise started on its journey on the tax date. It might still have been diverted into the domestic market. The fact that any such diversion would entail a breach of contract, that a part of the plant had already started on its export journey, that an export license had been obtained and a letter of credit deposited in this country increases the expectation on the tax date that exportation of the entire plant would eventuate. But that prospect, no matter

how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed." Id., at 157 (Emphasis supplied.)

So, in the present case even if the *Richfield Oil* case is controling, it is not sufficient that there was a purpose and contemplated intention to deliver across state lines, nor is it sufficient that in due course all of the material sold by the plaintiff herein was so delivered. It might still have been diverted into the domestic market. The fact that diversion would entail a breach of contract, that the material so purchased was to be used on a municipal project under engineered specifications requiring federal approval, that the material was sold by respondent pursuant to an invitation to bid on an out-of-state contract, or that other similar shipments might have been delivered by respondent to common carriers for delivery to purchasers out of the State of Utah increases the expectations that the material so purchased would be used and consumed out of the State of Utah. But that prospect does not change the fact that at the time Utah levied its non-discriminatory sales tax the materials so subjected to the tax had not started on their interstate journey, neither had they been committed to such a journey.

It is submitted that certainty of out-of-state destination, control and possibility of diversion are important in determining taxability of *property* in interstate commerce or foreign commerce, in that this determination is essential before it can be ascertained whether or not property has been sufficiently set apart from the common mass of taxable property so as to be exempt. However, in the case of

sales or gross receipt taxes on local incidents of interstate activity, certainty of out-of-state destination is not controlling. That which is controlling is that the tax be not one in form or substance that can be repeated by another state in a manner so as to lay an added burden on interstate distribution. See *Western Livestock* v. *Bureau*, 303 U.S. 250.

"Each state should be permitted to impose its sales tax upon all sales, regardless of the manner in which they are negotiated, which result in a delivery of goods to a buyer within the state." Barrett, *"Substance" Versus "Form" in the Application of the Commerce Clause to State Taxation*, 101 University of Penna. Law Review, 740, 776.

C. THAT SOME OF THE MATERIALS HEREIN MAY HAVE BEEN SUBJECTED TO A USE TAX BY THE STATE OF DESTINATION DOES NOT CONSTITUTE A SUBSEQUENTLY IMPOSED SALES TAX UPON A PRIOR LOCAL EVENT INVOLVING THEIR ACQUISITION A BURDEN UPON INTERSTATE COMMERCE.

The sales herein were subjected to tax by the states of destination in varying degrees. The Pipe Company, because of being qualified to collect use tax for the State of Colorado, withheld, collected and paid tax on transactions herein to the Colorado Department of Revenue.[1] (R. 64). These sales constitute 32.3 per cent of the total sales involved in this deficiency assessment (R. 64).

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[1] It would appear that respondent was mistaken and erred in volunteering a 2 per cent "sales tax" to the State of Colorado as indicated by Exhibit 4(e); R. 42, 157. *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327.

No tax was assessed by respondent for sales wherein the final destination of pipe sold was within the states of Arizona, New Mexico and Wyoming. Such sales constitute 36.6 per cent of the total sales herein involved (R. 64).

The states of Idaho and Montana received the remaining 31.4 per cent of the sales herein (R. 64). At the time of the proposed deficiency, these states had no sales or use tax laws.

Respondent contends that the risk of multiple taxation upon the same sales transaction constitutes a further test of tax invalidity under the Commerce Clause. While this may be true it is to be noted that the *same sales transaction* is not doubly burdened when the sale of goods is taxed by one state and the use thereof by another. Respondent's contention is further muted by a common use tax enactment, adopted by Arizona and New Mexico, providing that property brought into the state is subject to the tax except where a tax has already been levied on the sale or use of the property by another state. See Arizona Revised Statutes § 42-1409; New Mexico Statutes, Sec. 72-17-4.

In the *International Harvester* case, 322 U.S. 340, much was said concerning double taxation with reference to the Class D sales. It was argued that the appellant there would also probably be subjected to the Illinois Retailers' Occupation Tax for some of the sales which had been included within the Indiana gross receipts tax. This Court, speaking through MR. JUSTICE DOUGLAS, answered this contention as follows:

"But it will be time to cross that bridge when we come to it. For example, in the *Wood Preserving*

> *Corp.* case the state to which the purchaser took the ties might also have sought to tax the transaction by levying a use tax. But we did not withhold the hand of Indiana's tax collector on that account." 322 U.S. 340, 348.

The possibility of double taxation is not determinative of whether either the sale or the use of pipe herein took place in interstate commerce. In this regard the words of MR. JUSTICE FRANKFURTER in *Freeman v. Hewit*, 329 U.S. 249, 256, are significant:

> "It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate commerce are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a state can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. . ."

Accordingly, petitioner submits that the right of the State of Utah to tax sales made within its borders cannot be made to depend upon whether or not a corresponding foreign use of goods purchased in Utah is taxed or is taxable in another state.

CONCLUSION

The decision of the Court below holds that a transaction, ordinarily taxable as a complete transaction of sale by the State of Utah, cannot be taxed because in substance it

constitutes an interstate shipment. The practical effect of this decision is to shift the revenues from such a sale to a foreign state while leaving a taxable incident intact within the State of Utah. At the same time, a tax upon such an incident of sale does not appear to be one which, in form or substance, can be levied by another state in such a manner as to lay an added burden on interstate distribution. This decision opens the door to tax avoidance. It provides an inequitable basis for charging tax on some transactions and to some customers and not on others. It will result in administrative confusion and cause the state to lose revenue to which it is entitled. Petitioner cannot conceive that a state's right to tax should depend upon such considerations.

Petitioner urges that the judgment of the Utah Court should be reversed and that the proposed deficiency assessment against respondent be upheld as a lawful levy upon a series of intrastate transactions.

Respectfully submitted,

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